

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Affordable Connectivity Program)	WC Docket No. 21-450
)	

COMMENTS OF CTIA

Thomas C. Power
Senior Vice President and General Counsel

Scott K. Bergmann
Senior Vice President, Regulatory Affairs

Jennifer L. Oberhausen
Assistant Vice President, Regulatory Affairs

CTIA
1400 16th Street NW, Suite 600
Washington, D.C. 20036
202.736.3200

December 8, 2021

TABLE OF CONTENTS

I. Introduction and Summary	1
II. The Program Transition Rules Should Maximize Eligible Households’ Ability to Access ACP Benefits.	3
A. ACP-Eligible EBB Customers Should Not Be De-Enrolled Without Their Affirmative Request.	3
B. The Commission Should Expedite Reverification of EBB Customers That Qualified Under Discontinued Eligibility Criteria.	5
C. The Commission’s Rules Should Ensure That Eligible Households Enrolled by November 15, 2021 “Continue to Have Access to an Affordable Service Offering	7
D. The Commission Should Adopt Rules That Promote WIC-Participating Households’ Ability to Access ACP Benefits.	10
III. Maximizing Provider Participation Will Continue to Serve Low-Income Households and the Goals of the ACP.	11
IV. The New Parameters on Providers’ Offering of ACP Plans to Qualifying Households Must Be Implemented in an Orderly and Effective Manner.	13
V. The Commission Should Allow Eligible Households to Apply the Connected Device Subsidy to the Devices of Their Choice, Consistent With the Statute.	17
VI. The New Consumer Protection Provisions Must Be Implemented Through an APA Rulemaking.	20
VII. The Commission Should Avoid Importing Lifeline Rules That Would Undermine Household or Provider Participation.	22
VIII. Conclusion	25

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Affordable Connectivity Program)	WC Docket No. 21-450
)	

COMMENTS OF CTIA

CTIA¹ submits the following comments on the Commission’s *Public Notice* regarding the transition of the Emergency Broadband Benefit (“EBB”) program to the Affordable Connectivity Program (“ACP”),² as directed in the Infrastructure Investment and Jobs Act (“Infrastructure Act” or “IIJA”).³

I. INTRODUCTION AND SUMMARY

The Commission’s quick action this year to implement the EBB⁴ has helped over eight million households connect or stay connected to vital online access for work, education, healthcare, and other essential activities during the COVID-19 pandemic.⁵ Mobile wireless

¹ CTIA – The Wireless Association® (“CTIA”) (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

² *Wireline Competition Bureau Seeks Comment on the Implementation of the Affordable Connectivity Program*, Public Notice, DA 21-1453 (WCB rel. Nov. 18, 2021) (“*Public Notice*”).

³ Infrastructure Investment and Jobs Act, Pub. Law No. 117-58, div. F, tit. V, § 60502 (2021) (“Infrastructure Act” or “§ 60502” as applicable).

⁴ See *Emergency Broadband Benefit Program*, Report and Order, 36 FCC Rcd 4612 (2021) (“*EBB Order*”).

⁵ See Universal Service Administrative Company (“USAC”), Emergency Broadband Benefit Program Enrollments and Claims Tracker, Total Enrolled Households Weekly (last updated Dec.

broadband providers have been an important pillar in the EBB effort, making high-quality broadband service available to consumers at home, on the road, and wherever they need it. A strong majority of low-income households have shown that they find mobile broadband service to meet their needs best, with about 68 percent of EBB households choosing to apply their EBB subsidy to mobile broadband service.⁶

In the Infrastructure Act, Congress has recognized that ensuring low-income households' access to broadband is crucial beyond the COVID-19 pandemic by extending the availability of the program past the public health emergency period, providing an additional \$14.2 billion in funding, modifying the program to make it sustainable over the longer term, and changing the program's name to reflect its relevance outside the pandemic "emergency." In doing so, however, Congress made clear that it was "exten[ding] and modif[ying] the EBB program—not creating an entirely new program."⁷

The Commission's processes for transitioning from the EBB to the ACP should recognize Congress's intention by allowing both eligible households and participating providers to continue in the program to the greatest extent possible, should they choose to do so. In addition, the Commission's ACP rules should seek to retain the positive attributes of the EBB program that have made it more successful than Lifeline at both serving low-income households and attracting competitive provider participation. While, as a more permanent program, ACP will

6, 2021), <https://www.usac.org/about/-emergency-broadband-benefit-program/emergency-broadband-benefit-program-enrollments-and-claims-tracker/>.

⁶ See USAC, Additional EBB Program Data, Total Enrolled EBB Program Subscribers by Service Type (last updated Nov. 1, 2021), <https://www.usac.org/about/emergency-broadband-benefit-program/emergency-broadband-benefit-program-enrollments-and-claims-tracker/additional-ebb-program-data/> (67.9% mobile broadband).

⁷ Infrastructure Act, § 60502(a).

need some additional safeguards that would have been unwarranted in an emergency program like the EBB, the Commission should be mindful of the need to support the program’s continued success and avoid pitfalls that have historically hobbled Lifeline’s utility.

To these ends, CTIA recommends that the Commission adopt ACP rules that:

- Maximize eligible households’ ability to access ACP benefits by avoiding de-enrollment of current EBB customers in the transition without their affirmative request and facilitating the retention of eligible households that originally qualified under prior eligibility criteria;
- Facilitate broad provider participation, including the retention of providers currently participating in the EBB;
- Implement the new requirement that participating providers allow eligible households to apply the ACP benefit to “any internet service offering of the participating provider, at the same terms available to households that are not eligible households” in an orderly and rational manner;
- Allow eligible households to apply the connected device subsidy to devices of their choosing, consistent with the statute, including all “tablets”; and
- Avoid imposing restrictions from the Lifeline program into ACP, which would hamper the customer experience and inadvertently depress program enrollment.

II. THE PROGRAM TRANSITION RULES SHOULD MAXIMIZE ELIGIBLE HOUSEHOLDS’ ABILITY TO ACCESS ACP BENEFITS.

A. ACP-ELIGIBLE EBB CUSTOMERS SHOULD NOT BE DE-ENROLLED WITHOUT THEIR AFFIRMATIVE REQUEST.

Consistent with the Infrastructure Act’s intention for the ACP to be a continuation and modification of the EBB rather than an entirely new program, Section 60502(b) both (a) grandfathers, for 60 days, all EBB customers enrolled as of the effective date against changes to the support amount and eligibility rules;⁸ and (b) establishes that all households participating in the EBB on the date of the Infrastructure Act’s enactment that are eligible for the ACP “shall

⁸ *Id.* § 60502(b)(2).

continue to have access to an affordable service offering.”⁹ Taken together, these provisions make clear that Congress intends for the Commission to ensure that eligible households participating in the EBB can remain in the program as it transitions to the ACP.

As a result, the *Public Notice*’s proposal to require EBB-enrolled households to affirmatively opt in to remain enrolled in the ACP is fundamentally misguided, and should be rejected.¹⁰ If implemented, this proposal would de-enroll every existing EBB household that does not affirmatively opt into the ACP by a Commission-imposed deadline, causing them to lose their ACP benefits and potentially their access to broadband service. Based on recent experience, it is likely that most EBB subscribers would not opt in by the deadline. In the twenty-six weeks since Lifeline customers have had the ability to opt in to EBB, more than 40 percent have yet to do so.¹¹

An opt-in approach is plainly contrary to Congress’s intent to allow EBB-participating households to retain their benefits through the transition. This approach would be equally contrary to the public interest, because it would almost certainly lead to the loss of benefits by a significant number of ACP-eligible households. Mass de-enrollments of eligible households would cause the exact kind of economic hardship that Congress created the ACP to avoid and would represent a decidedly inauspicious beginning for the new program.

⁹ *Id.* § 60502(b)(3).

¹⁰ See *Public Notice* ¶ 122.

¹¹ Specifically, USAC indicates that 3.7 million EBB customers have qualified based on Lifeline participation. USAC, Additional EBB Program Data, Total Enrolled EBB Program Subscribers by Method of Verification (last updated Nov. 1, 2021), <https://www.usac.org/about/emergency-broadband-benefit-program/emergency-broadband-benefit-program-enrollments-and-claims-tracker/additional-ebb-program-data/>. The most recent public data on Lifeline enrollment reveals a figure of 6.3 million. USAC, *High Cost and Low Income Committee Briefing Book*, at 54 (Oct. 25, 2021), <https://www.usac.org/wp-content/uploads/about/documents/leadership/-materials/hcli/2021/2021.10.25-HCLI-Open-Session-Briefing-Book.pdf>.

By contrast, an opt-out approach would better serve the statutory goals of keeping existing eligible households enrolled and facilitating access to the benefit. This approach could be implemented consistent with the goal of ensuring that consumers do not receive surprise bills for their ACP service. First, it is important to bear in mind that some households will not experience any changes in benefits as a result of the transition to the ACP. This includes all Tribal customers (whose benefit amount remains unchanged) and all customers subscribing to plans that cost \$30 or less (and thus will remain fully subsidized under the new support amount). For these customers, an opt-in requirement would serve no purpose but create a burden and risk of de-enrollment. For EBB households who will see a change in their bills as a result of the new law, the Commission should require that participating providers provide timely notice regarding the change in the benefit amount, including a clear indication of the new amount of their monthly bill after the 60-day period ends. The notice should clearly indicate that the subscriber may elect to switch to a different plan or withdraw from the program and provide the deadline for doing so. Any household that does not notify its provider that it wishes to leave the program should remain enrolled.

B. THE COMMISSION SHOULD EXPEDITE REVERIFICATION OF EBB CUSTOMERS THAT QUALIFIED UNDER DISCONTINUED ELIGIBILITY CRITERIA.

The Infrastructure Act eliminated the EBB eligibility criteria tied to the COVID-19 pandemic, including substantial loss of income and participation in providers' pandemic-related relief programs.¹² As a result, as the *Public Notice* observes, “before the end of the 60-day transition period, EBB-enrolled households that qualified for the EBB Program through eligibility criteria that are not applicable to the Affordable Connectivity Program will be required

¹² Infrastructure Act, § 60502(b)(1)(A)(ii).

to demonstrate their eligibility to receive an ACP benefit after the transition period ends.”¹³ Because three-quarters of current EBB households were verified directly or indirectly through the National Verifier,¹⁴ in most cases only the National Verifier will know which customers qualified under discontinued eligibility criteria. The Commission therefore should direct USAC to identify such customers without delay and begin the process of verifying their eligibility under valid criteria, wherever possible.

Because these households are already enrolled in the EBB, USAC is already in possession of their identity information; there is no reason to require them to “submit new applications”¹⁵ if USAC can verify their eligibility through existing database connections. The Commission should direct USAC to check all such households’ identity information against its existing automated data sources without delay. This approach would be consistent with the way that USAC currently checks all Lifeline applicants’ identity information against its automated databases as the first step in determining their eligibility.¹⁶ Beginning this process immediately would help ensure that, for customers who cannot be verified through the automated database connections, their 60-day period to respond to a notice of the need to submit eligibility information will not extend beyond the 60-day transition period provided in the statute, which would result in unnecessary disconnections of eligible households.

¹³ *Public Notice* ¶ 121.

¹⁴ Per USAC’s most recent data, as of November 1, of the 7.1 million EBB households 1.8 million were verified by the NLEV, and 3.7 million were verified through Lifeline participation (which also generally is verified through NLEV). *Supra* note 11, USAC, Additional EBB Program Data.

¹⁵ *Cf. Public Notice* ¶ 121.

¹⁶ See USAC, *Lifeline National Verifier Plan*, at 29 (Jan. 2021), <https://www.usac.org/wp-content/uploads/lifeline/documents/nv/plans/National-Verifier-Plan-%E2%80%93-January-2021-version-1.pdf>.

The Commission also should direct USAC to notify providers of any of their customers who will need to submit eligibility information at the same time the customers are notified, so that providers who wish to do so also can conduct outreach to affected customers to urge those customers to complete the eligibility verification process through the National Verifier in a timely fashion.

There is no reason for USAC to wait for the rule change's effective date to begin this effort. Nothing in the Infrastructure Act limits the Commission's, USAC's, or providers' ability to notify customers about changes to the program's eligibility criteria to allow them to continue to receive benefits if eligible. This approach will serve the public interest and the goals of the program by maximizing the opportunity for ACP-eligible households that qualified under discontinued criteria to re-establish their eligibility under new criteria.

C. THE COMMISSION'S RULES SHOULD ENSURE THAT ELIGIBLE HOUSEHOLDS ENROLLED BY NOVEMBER 15, 2021 "CONTINUE TO HAVE ACCESS TO AN AFFORDABLE SERVICE OFFERING"

In addition to the measures discussed above to effectuate section 60502(b)(2) for eligible households enrolled in EBB before the effective date (*i.e.*, December 31, 2021), the Commission's rules also should specifically effectuate the "transition" provision in section 60502(b)(3) for households enrolled in EBB "on the day before the date of enactment" (*i.e.*, on November 14, 2021).¹⁷ The Commission can give meaning to this provision by allowing these customers to remain enrolled at the current benefit level until the original \$3.2 billion EBB appropriation is exhausted.

¹⁷ The Commission seeks comment on the meaning and scope of this provision in the *Public Notice*. *Public Notice* ¶ 125.

This proposal is a reasonable interpretation of the statutory text. It is important to note that the transition provision in section 60502(b)(3) differs from the 60-day grandfathering provision in section 60502(b)(2) in certain crucial respects. As noted above, the 60-day grandfathering provision applies to households enrolled as of December 31, 2021, whether or not they remain eligible for ACP, while the transition provision applies to households participating in EBB as of November 14, 2021 that remain eligible for ACP. Thus, section 60502(b)(3) creates a separate category of EBB subscribers—those enrolled on November 14, 2021 that qualify under the new ACP eligibility criteria. This category is different from and narrower than the category of EBB subscribers captured by section 60502(b)(2)—those enrolled as of December 31, 2021 that would otherwise see a reduction in their benefit (apparently as a result of the benefit change or because they are no longer eligible).

The two provisions of the statute also differ with respect to their duration. The 60-day grandfathering provision provides relief from changes to the program to its target customers for a specific 60-day period, while the transition provision provides that its target customers “shall continue to have access to an affordable service offering,” without any particular time limit. The two provisions also differ from one another in that the 60-day grandfathering provision refers specifically to the applicability of the “affordable connectivity benefit” under the “[Affordable Connectivity] Program,” while the transition provision provides “access to an affordable service offering” that is not limited to the confines of the revised program.

Under accepted principles of statutory construction, these differences in language must be presumed to be intentional, and the Commission should implement them accordingly.¹⁸ To the

¹⁸ See, e.g., *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (agencies should “to give effect, if possible, to every clause and word of a statute”) (quoting *United States v. Menasche*, 348 U.S.

extent that the transition provision is ambiguous, the Commission has deference to interpret it in a reasonable fashion.¹⁹

Given the structure of the transition provision and the way Congress crafted it differently from the 60-day grandfathering provision, it is reasonable to interpret the transition provision to allow the Commission to provide support at the \$50 subsidy level to non-Tribal EBB customers enrolled on November 14, 2021 that remain eligible for ACP for a reasonable period of time beyond the 60-day period after the effective date. Providing the original amount of support gives effect to the Commission’s obligation to ensure that these customers “continue to have access to an affordable service offering” that is different from the “affordable connectivity benefit.” Providing it for a longer period of time gives effect to the omission from section 60503(b)(3) of the 60-day provision that is present in section 60502(b)(2).

To put a boundary on this reasonable period, CTIA proposes that the Commission use the date that the Commission certifies to Congress that the original \$3.2 billion EBB appropriation is exhausted. This date is connected to the EBB program rather than the ACP—a reasonable approach given the reference in section 60502(b)(3) to “an affordable service offering” rather than “the affordable connectivity benefit” as in section 60502(b)(2). It also enhances the utility of the requirement in section 60502(b)(4) that the Commission report to Congress when the original EBB appropriation is exhausted, which is otherwise a matter of largely academic interest.

To further ensure that this end date for the section 60502(b)(3) transition benefit is tied to the EBB rather than the ACP, the Commission could require USAC to limit expenditures from

528, 538-39 (1955) (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))) (internal quotation marks omitted).

¹⁹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

the original \$3.2 billion appropriation to services for customers enrolled as of November 14, 2021, until that pool of funding is exhausted.

D. THE COMMISSION SHOULD ADOPT RULES THAT PROMOTE WIC-PARTICIPATING HOUSEHOLDS' ABILITY TO ACCESS ACP BENEFITS.

As the *Public Notice* observes, in the likely event that USAC is unable to verify Special Supplemental Nutritional Program for Woman, Infants and Children (“WIC”) program eligibility through an automated database connection at the time the ACP launches, USAC will have to verify WIC participation via manual document review.²⁰ The Commission should take steps to enable WIC eligibility to be verified through automated databases as soon as possible, and set reasonable standards for documentation required for manual verification in the meantime.

Like the Supplemental Nutrition Assistance Program (“SNAP”), WIC is a food benefit program primarily administered through Electronic Benefit Transfer (“EBT”) cards.²¹ In states where USAC lacks a database connection to verify SNAP participation, some SNAP participants have been unable to establish their participation because the rules have required the submission of documents not typically received or retained by SNAP recipients. Consistent with the Commission’s commitment to using database connections wherever possible,²² the Commission should direct USAC to obtain direct database connections with CDP, Inc., Conduent, and Solutran, which collectively administer WIC EBT processing virtually nationwide.²³ Such database connections would allow USAC to confirm a customer’s current eligibility based on the

²⁰ *Public Notice* ¶ 38.

²¹ See generally USDA Food and Nutrition Service, Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), <https://www.fns.usda.gov/wic> (last visited Dec. 7, 2021).

²² See, e.g., *Public Notice* ¶ 42.

²³ See USDA, WIC EBT Detail Status Report, <https://www.fns.usda.gov/sites/default/files/-resource-files/December2021WICEBTDetailStatusReport.pdf> (last visited Dec. 7, 2021).

last four digits of the WIC EBT card number. This could be facilitated by the Department of Agriculture as part of the memorandum of understanding it must sign with USAC by January 15, 2022, and as part of the data it must begin sharing by February 15, 2022.²⁴

To the extent that participants are required to submit additional documentation, the Commission must ensure that the ACP rules and USAC procedures require WIC participants to submit documents that are readily available. At minimum, the Commission should direct USAC to ensure that WIC participants may establish their current participation through a combination of documents. For example, an applicant may have a WIC benefit award letter, but the letter may not be recent. That same applicant may have a WIC EBT card, but that card may not identify the participant's name or address. Together, however, the two documents effectively establish that the applicant is a WIC participant. USAC's processes should reflect this reality.

III. MAXIMIZING PROVIDER PARTICIPATION WILL CONTINUE TO SERVE LOW-INCOME HOUSEHOLDS AND THE GOALS OF THE ACP.

In establishing the EBB program, Congress required that providers wishing to participate be approved on an "expedited" or "automatic" basis, which the Commission reflected in its EBB program rules.²⁵ Congress left this approach intact for the ACP, so the Commission's ACP rules should continue to "encourage provider participation and facilitate consumer choice."²⁶ To this end, the Commission should adopt the *Public Notice*'s proposal to allow existing participating providers to continue to participate without submitting new applications.²⁷

²⁴ Infrastructure Act, § 60502(e).

²⁵ See generally Consolidated Appropriations Act, Pub. Law No. 116-260, div. N, tit. IX, §§ 904(a)(12)(A), 904(d)(2) (2020).

²⁶ *EBB Order*, 36 FCC Rcd at 4663 ¶ 105.

²⁷ See *Public Notice* ¶¶ 9, 12.

Because the Infrastructure Act made no changes to the criteria for provider eligibility, there is no apparent reason for the Commission to re-review an EBB provider's authority to participate in the ACP. In addition, given the time pressure to transition the EBB to the ACP, it would be counterproductive to interject an additional approval layer.

For the same reasons, the Commission should not require existing participating providers to submit new election notices.²⁸ One of the primary functions of the election notices in EBB has been to collect and record the EBB-eligible plans offered by participating providers, but this function has been largely obviated by the Infrastructure Act's requirement that providers make the ACP benefit available on all generally available plans. The other primary function of the election notices has been to collect participating providers' certifications to comply with the program rules, but there is no practical reason to require new election notices from existing participating providers to renew such certifications, given that such certifications are required each month in the reimbursement submission process. Moreover, as discussed elsewhere in these Comments, the Commission should avoid making significant changes to the EBB rules, other than to implement necessary changes required by the Infrastructure Act.²⁹ Thus, providers' existing certifications may continue to be relied upon.

Finally, the Commission also should implement a process for participating providers to provide notice to USAC at any time in the event they no longer wish to participate in the ACP.³⁰ Such notices should be effective upon delivery without further action, but may be associated

²⁸ *Cf. id.* ¶ 14.

²⁹ *See infra* Section VII.

³⁰ *See Public Notice* ¶ 13.

with an obligation to provide reasonable notice to participating households of the provider's departure from the program (e.g., 30 days).

IV. THE NEW PARAMETERS ON PROVIDERS' OFFERING OF ACP PLANS TO QUALIFYING HOUSEHOLDS MUST BE IMPLEMENTED IN AN ORDERLY AND EFFECTIVE MANNER.

As the *Public Notice* rightly recognizes, under any interpretation, there will be significant implementation challenges with the new requirement that participating providers "allow an eligible household to apply the affordable connectivity benefit to any internet service offering of the participating provider, at the same terms available to households that are not eligible households."³¹ The same is true of other provisions that affect how participating providers offer ACP benefits to eligible households. Many providers will need a sufficient implementation period (at least 180 days) to implement the capability to allow customers to apply the discount beyond their existing EBB plans to currently generally available plans and implement other process changes required by section 60502.³²

For many providers, the ability to apply a discount to a particular plan depends upon the technical limitations of the provider's billing system. Because the ACP benefit is a new discount, many providers' billing systems may not have the ability to apply an across-the-board discount in this manner. Some providers, particularly those that have undergone mergers or acquisitions, may have multiple billing systems that need to be updated. As a result, providers will need sufficient time to implement changes in their billing systems necessary to allow them to apply the discount across all plans to which the requirement applies. In addition, providers

³¹ *Id.* ¶¶ 53, 55 (footnote omitted).

³² While the rules should provide a reasonable implementation period, providers that are able to implement the required changes before the deadline should be permitted to do so.

will need time to revise procedures for customer service and sales personnel to reflect the new policy.

The Commission also should make clear the “contours”³³ and scope of the new requirement by clarifying that participating providers are only obligated to apply the discount to plans that are *currently* generally available to all customers and subject to the scope of *geographic* availability for the plan. By its own terms, the new provision requires participating providers to allow eligible households to apply the ACP benefit to “any internet service offering of the participating provider *at the same terms available to households that are not eligible households*.”³⁴ Plans that are no longer generally available—including legacy and grandfathered plans—are not “available to households that are not eligible households”³⁵ and thus are not subject to the requirement. In the statute’s phrasing, the “terms available to households that are not eligible households” for legacy or grandfathered plans would be “not available.”³⁶ Similarly, plans that are offered by the provider to non-eligible households only in a particular geographic area would be available to ACP-eligible households only in the same geographic area.

The Commission also should make clear that the requirement that participating providers allow ACP households to apply the benefit to any plan that is available to a non-eligible household does not restrict participating providers’ ability to offer ACP-specific plans if they wish to do so. The law imposes no reciprocal obligation for participating providers to make ACP plans available to ineligible households, and allowed the benefit to be applied to newly added plans by deleting the original language limiting eligible plans to those in effect on

³³ *Public Notice* ¶ 55.

³⁴ Infrastructure Act, § 60502(a)(3)(B)(ii), § 904(b)(7)(A)(i) (2021) (emphasis added).

³⁵ *Id.*

³⁶ *Id.*

December 1, 2020. This flexibility also would allow participating providers to offer grandfathered or legacy plans to eligible households if they choose to do so.

Similarly, the Commission should make clear that, where the “terms available to households that are not eligible households”³⁷ for a plan would create an inconsistency with other provisions of section 904, as amended, or the ACP rules, participating providers may, at their option, either exclude such plans from their ACP offerings or require ACP customers to meet the terms available to non-ACP households. This could affect plans that, for example, are only available to customers signing an extended contract, because new section 904(b)(11) requires the Commission to establish rules prohibiting “inappropriate” requirements for extended service contracts or limitations on switching plans or service providers.³⁸ While the scope of these requirements is not yet clear,³⁹ to the extent that the Commission’s ultimate interpretation of the law or implementation in ACP rules would restrict providers’ ability to offer a plan to eligible households “at the same terms available to households that are not eligible households,”⁴⁰ such plans would not, under the statute, have to be offered to ACP-eligible households.

The ACP rules should also define reasonable bounds on the obligation to inform new and renewing customers of the availability of the ACP benefit. The Infrastructure Act requires participating providers to notify customers about the existence of the ACP and how to enroll when the customer “subscribes to, or renews a subscription to, an internet service offering” of

³⁷ *Id.*

³⁸ *Id.* § 60502(a)(3)(B), § 904(b)(11) (2021).

³⁹ *See infra* Section VI.

⁴⁰ Infrastructure Act, § 60502(a)(3)(B)(ii), § 904(b)(7)(A)(i) (2021).

the provider.⁴¹ The Commission should make clear that this requirement applies only when customers engage with providers to select a plan or change their existing plan.⁴² It should not apply to other situations that could be characterized as “subscription” or “renewal”; for example, customers on month-to-month contracts “renew” every month, but it would unnecessarily burden both providers and customers if providers had to re-inform them about the ACP each time the customer pays a bill.

These and other new requirements in section 60502 will take time to implement, and most providers will not be able to deploy them by December 31, 2021.⁴³ Indeed, given the complexity of the “any plan” requirement and the other new restrictions on providers’ terms, the ACP implementation challenge will be substantially more complex for many providers than the EBB implementation, where providers could limit the scope of affected plans. The Commission therefore should provide a reasonable period after adopting new rules for providers to implement the new requirements applicable to the ACP.

Finally, given the requirement for providers to allow ACP customers to apply the benefit to any plan on the same terms available to non-eligible households, there is no reason for the Commission to impose additional requirements on covered plans, such as minimum service standards.⁴⁴ The new requirement expresses Congressional intent regarding the scope of plans that should be included in ACP, so there is no need for additional parameters. Indeed, in light of

⁴¹ *Id.* § 60502(b)(7)(A)(ii), § 904(b)(10)(A) (2021).

⁴² *Public Notice* ¶ 106; Infrastructure Act, § 60502(a)(3)(B), § 904(b)(10)(A) (2021).

⁴³ *See Public Notice* ¶ 106. As noted above, participating providers that are able to apply new requirements sooner should be permitted to do so.

⁴⁴ *Public Notice* ¶ 54.

the new provision, the Commission would not possess the authority to impose different requirements.

V. THE COMMISSION SHOULD ALLOW ELIGIBLE HOUSEHOLDS TO APPLY THE CONNECTED DEVICE SUBSIDY TO THE DEVICES OF THEIR CHOICE, CONSISTENT WITH THE STATUTE.

Under section 904(a)(4), a “connected device” eligible for support includes “a laptop or desktop computer or a tablet.” The Infrastructure Act leaves this definition unchanged. The *Public Notice* asks whether the Commission should retain the limitations on that definition adopted in the *EBB Order*.⁴⁵ The answer is unequivocally no. The *EBB Order* adopted a narrow definition of “tablet” that excludes any device that can independently make cellular calls.⁴⁶ This definition is unjustified under the terms of the statute and should be modified as the Commission transitions to the ACP.

In the proceeding leading to the *EBB Order*, CTIA and other parties pointed out that 4G and later-generation mobile devices have the same capabilities as tablets and should be recognized as such.⁴⁷ CTIA distinguished 4G and later-generation mobile devices, which are functionally indistinguishable from tablets, from 3G and earlier devices, including feature phones, that lack such capability.⁴⁸ In rejecting these arguments, the *EBB Order* simply stated that the statute “explicitly declined to include mobile phones in its definition” and therefore found “that the definition of a tablet does not include devices that can independently make cellular calls such as large phones or phablets.”⁴⁹ This analysis was deficient because it:

⁴⁵ *Id.* ¶ 61.

⁴⁶ *EBB Order*, 36 FCC Rcd at 4651 ¶ 79.

⁴⁷ *See, e.g.*, Reply Comments of CTIA, WC Docket No. 20-445, at 9 (filed Feb. 16, 2021).

⁴⁸ *Id.*

⁴⁹ *EBB Order*, 36 FCC Rcd at 4651 ¶ 79 (footnote omitted).

- Failed to address the distinction drawn by CTIA between 4G and later-generation mobile devices that have the same functionality as tablets, and earlier-generation mobile devices including feature phones that do not. This distinction goes to the definition of “tablet,” and does not call upon the Commission to allow funding for devices not included in the statute; and
- Did not justify the “ability to make cellular calls” criterion selected to distinguish between a covered “tablet” and an excluded “mobile phone” in relation to any language in the statute or information in the record.⁵⁰

Since the *EBB Order* was adopted, as the *Public Notice* acknowledges,⁵¹ another party has pointed out that the “independent ability to make cellular calls” criterion arbitrarily excludes devices that are clearly tablets, by any natural definition, if they are capable of making cellular calls, and actually prevents EBB customers from utilizing the voice calling capability included in EBB-funded voice-broadband service bundles if the consumer has purchased a covered tablet.⁵² This further demonstrates that the current policy for distinguishing between “tablets” and “mobile phones” is not working and must be replaced.

The Commission should take the opportunity of the rule revisions undertaken as the EBB transitions to the ACP to eliminate the “independent ability to make cellular calls” as the criterion for distinguishing between a covered “tablet” and an excluded “mobile phone.” The Commission should replace that definition with the distinction recommended and justified by CTIA and others in the EBB proceeding:

⁵⁰ In addition, some laptop computers also provide the independent capability to make cellular calls, yet such computers are not excluded. Therefore, it is clear that the independent capability to make a cellular call is not the appropriate distinction between a mobile phone and other types of devices in this context.

⁵¹ *Public Notice* ¶ 61.

⁵² See Petition of Global Connection Inc. of America for Limited Waiver, WC Docket 20-445 (filed Oct. 25, 2021).

A tablet is a mobile device utilizing 4G or later-generation mobile technology; a mobile phone is any earlier-generation mobile device or feature phone.

Alternatively or in addition, the Commission should consider using the definitions employed by the Office of Engineering and Technology (“OET”) in evaluating radiofrequency emissions from devices, which treat devices with displays larger than 15 cm (diagonal) or overall dimensions greater than 16 cm (diagonal) as mini-tablets (phablets)⁵³ and devices with displays larger than 20 cm (diagonal) as tablets.⁵⁴ The testing parameters for these devices recognizes that they are often used as tablets—i.e., they are not held up to the ear.⁵⁵ As a result, both of these categories of devices should be included in the definition of “tablet.”

Finally, the Commission should ensure that participating providers that make devices available to consumers are reimbursed for those devices, even if the household subsequently switches providers. Such a rule will allow the Commission to ensure that each eligible household only receives one connected device through the program, consistent with the one-per-household rule.⁵⁶ Specifically, the Commission should make clear that, if a provider populates the National Lifeline Accountability Database with a device delivery date while the household is

⁵³ See FCC OET Lab. Div. Knowledge Database (“KDB”) 648474 D04, *SAR Evaluation Considerations for Wireless Handsets*, at 2 (Oct. 23, 2015), https://apps.fcc.gov/kdb/-GetAttachment.html?id=zCDu9bDcV8fcsumpj%2Bef3w%3D%3D&desc=648474%20D04%20Handset%20SAR%20v01r03&tracking_number=33853.

⁵⁴ See FCC OET Lab. Div. KDB 941225 D07, *SAR Evaluation Procedures for UMPC Mini-Tablet Devices* (Oct. 23, 2015), https://apps.fcc.gov/kdb/GetAttachment.html?id=7FGq9%2Bfc-Atu3AAr3ev5CFA%3D%3D&desc=941225%20D07%20UMPC%20Mini%20Tablet%20v01r02&tracking_number=26930.

⁵⁵ *Id.*

⁵⁶ See *EBB Order*, 36 FCC Rcd at 4632 ¶ 44; Consolidated Appropriations Act, div. N. tit. IX, § 904(a)(6), (a)(7), *amended by* Infrastructure Act, div. F, tit. V, §§ 60502 (a)(2)(A), (b)(1)(A)(ii), § 904(a)(6), (a)(7)(A) (2021).

enrolled with that provider, that provider should be permitted to claim reimbursement for the device even if the household subsequently switches providers.

VI. THE NEW CONSUMER PROTECTION PROVISIONS MUST BE IMPLEMENTED THROUGH AN APA RULEMAKING.

The Infrastructure Act adds new section 904(b)(11)(A), which requires the Commission to adopt certain consumer protection provisions through a standard rulemaking proceeding under the Administrative Procedure Act (“APA”). The *Public Notice* seeks comment on how to “reconcile” the “apparent conflict” between this requirement and the general exemption from APA notice-and-comment requirements for implementing the EBB (now the ACP) provided in the original text of section 904(h) in the Consolidated Appropriations Act 2021.⁵⁷ There is, however, no “conflict” between these two provisions.

By explicitly requiring that section 904(b)(11)(A) be implemented through a standard rulemaking process, Congress demonstrated that it clearly understood that the rest of the Commission’s rulemaking activity to implement the transition to the ACP would be covered by the APA exemption in original section 904(h). Were that not the case, the reference to the APA in section 904(b)(11)(A) would be “surplusage”—it would add no value to the provision. Appellate courts admonish agencies (as well as lower courts) to avoid interpreting statutes in ways that treat statutory language in this manner.⁵⁸

Recognizing that the amendments to section 904 to transition the EBB to the ACP would otherwise be adopted through an expedited rulemaking not bound by standard APA

⁵⁷ *Public Notice* ¶ 91.

⁵⁸ Certain canons of construction counsel courts to interpret statutes in a way that avoids rendering any language superfluous, and “to give effect, if possible, to every clause and word of a statute.” *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))) (internal quotation marks omitted).

requirements, Congress carved out an exception to the exemption for the provisions in section 904(b)(11)(A).⁵⁹ This represents Congress’s considered judgment that these new provisions should be considered and adopted through a standard rulemaking process under the APA.

This judgment of Congress is supported by the nature of the requirements in new section 904(b)(11)(A), which are described in very general terms and utilize language not otherwise defined in the statute. For example, the new provisions call upon the Commission to proscribe “inappropriate upselling or downselling” of ACP service plans,⁶⁰ without defining what “upselling” or “downselling” means in this context or providing any clarification of when it is “inappropriate.” The new provision also requires the Commission to define when term contracts and other restrictions on switching plans or providers are “inappropriate,” without providing clarification.⁶¹ Given the ambiguity in these provisions, and the significance that such provisions will have to the relationship between broadband providers and ACP customers, it makes eminent sense that Congress would wish to ensure that stakeholders and the Commission have the opportunity to develop a full record and the Commission has the time to consider the issues in an unhurried manner and with full regard to the APA requirements that are the hallmarks of reasoned agency rulemaking.

Given Congress’s clear intent that the provisions of new section 904(b)(11)(A) be subject to standard APA rulemaking requirements, the Commission would not be justified in invoking

⁵⁹ Indeed, the requirement that the Commission use a traditional APA process to adopt rules implementing the new consumer protection requirements confirms Congress’s intent that the APA exemption in original section 904(h) also applies to the Commission’s implementation of other provisions of § 60502.

⁶⁰ Infrastructure Act, § 60502(a)(3)(B)(ii), § 904(b)(11)(A)(i) (2021).

⁶¹ *Id.* § 60502(a)(3)(B)(ii), § 904(b)(11)(A)(iv) (2021).

the exemption provided in 5 U.S.C. § 553(b)(B).⁶² As the *Public Notice* concedes, courts have construed this exemption narrowly.⁶³ Moreover, the *Public Notice* references no instance in which a court has upheld an agency's deployment of the exemption to avoid an APA rulemaking obligation, such as this one, that Congress specifically interposed in a proceeding otherwise exempt from APA requirements, nor is CTIA aware of any.

The provisions in new section 904(b)(11)(A) are thus subject to the notice and comment requirements of the APA, and the Commission should issue a notice of proposed rulemaking to implement them.

VII. THE COMMISSION SHOULD AVOID IMPORTING LIFELINE RULES THAT WOULD UNDERMINE HOUSEHOLD OR PROVIDER PARTICIPATION.

The Commission's ACP rules should seek to retain the consumer-friendly attributes of the EBB program that have made it more successful than Lifeline at both serving low-income households and attracting competitive provider participation. To that end, the Commission should avoid importing unnecessary restrictions from the Lifeline program that will either impede the participation of eligible households or deter the participation of the broadest range of providers.

CTIA recognizes that the ACP, as a more permanent program, may need some additional safeguards that would have been unwarranted in an emergency program like the EBB. At the same time, the Commission should be mindful of the need to protect the program's success and avoid pitfalls that have historically hobbled Lifeline's utility. The Commission therefore should avoid importing Lifeline requirements that are not needed to safeguard the integrity of the ACP or guard against waste, fraud, and abuse. In particular, the Commission should decline to impose

⁶² *Public Notice* ¶ 92.

⁶³ *Id.* ¶ 92 n.189.

the following Lifeline rules in the ACP: (i) de-enrolling customers for non-usage in a given month;⁶⁴ (ii) minimum service standards;⁶⁵ or (iii) a prohibition on commissions for sales representative.⁶⁶

De-enrolling customers for non-usage in a claim month. Unlike Lifeline, where providers must de-enroll customers that fail to use the service in a thirty-day period,⁶⁷ the EBB rules more constructively simply prohibit participating providers from claiming EBB reimbursement for customers in a claim month where the customer had no usage. There are various reasons why an eligible household might not use the service in a given month that do not necessarily reflect that the household does not need or value the service. Disallowing reimbursement in such months fully protects the program against the expenditure of funds for a service that was not used by the eligible household, but prevents unnecessary de-enrollments. By contrast, the Lifeline approach can result in needless de-enrollments of eligible households, some of whom then may lose access to the service when they need it or, at minimum, face the burden of re-enrollment. In addition, the EBB approach aligns providers' obligation to monitor for non-usage with the claim month, facilitating the provider's review. In contrast, the Lifeline rule effectively requires providers to monitor for any rolling thirty-day period of non-usage, which is significantly more complicated to implement from a systems perspective, with no added benefit to the program.

Minimum service standards. As discussed above, there is no apparent need for minimum service standards ("MSS") in the ACP given the Congressional directive for providers to allow

⁶⁴ *Id.* ¶ 48.

⁶⁵ *Id.* ¶ 54.

⁶⁶ *Id.* ¶ 20; 47 C.F.R. § 54.406(b).

⁶⁷ 47 C.F.R. § 54.405(e)(3).

ACP customers to apply the benefit to all generally available plans.⁶⁸ Indeed, given this requirement, the Commission would not have the authority to limit ACP to plans that meet any particular minimum service standards. In addition, however, it does not appear that the Lifeline minimum service standards have had significant benefit to the program. Rather, at least as to mobile broadband MSS, the Commission has been required to waive or modify the application of the MSS rules in each of the last three years,⁶⁹ and the Commission has suggested that it may consider the role of MSS in Lifeline going forward in light of the experience of the EBB program,⁷⁰ where no MSS has applied. Given this history, it would not make sense to attempt to incorporate MSS into the ACP.

Prohibition on commissions for sales representatives. The ban on commissions was adopted in the Lifeline program before the full impact of the deployment of the National Verifier had been incorporated into the program, and it is unclear whether the limitation has generated benefits that justify its costs. In particular, it is unclear whether the restriction on commissions has done more to limit providers' ability to identify and reach eligible low-income households than it has to reduce waste, fraud, or abuse. The Commission should not import this restriction into the ACP.

Although the Commission should refrain from importing Lifeline requirements that are not needed, it should update certain rule provisions that reflect the "emergency" nature of the EBB that are no longer useful or practical for the longer-term ACP. For example, the strict 15-

⁶⁸ See *supra* Section IV.

⁶⁹ See *Lifeline and Link Up Reform and Modernization et al.*, Order, DA 21-1389 (WCB rel. Nov. 5, 2021) ("2021 Waiver Order"); *Lifeline and Link Up Reform and Modernization et al.*, Order, 35 FCC Rcd 12958, 12958 ¶ 2 (WCB 2020); *Lifeline and Link Up Reform and Modernization et al.*, Order, 34 FCC Rcd 11020, 11020 ¶ 2 (2019).

⁷⁰ See, e.g., 2021 Waiver Order ¶ 15.

day deadline for the submission of claims in section 54.1608(g) should be revised to a more reasonable period for the review and submission of claims. Likewise, providers should have a reasonable opportunity to correct prior months' claims, as in Lifeline.⁷¹ Both of these revisions will allow for the more efficient administration of the program and help prevent waste, fraud, and abuse in the ACP.

VIII. CONCLUSION

The EBB program has provided invaluable assistance in keeping low-income Americans connected during the pandemic, and the Infrastructure Act creates the potential for the ACP to become a long-term success story for the Commission to address some of the most persistent aspects of the digital divide. The ACP's ability to achieve this goal depends, however, on eligible households' ability to access the program and providers' willingness to participate. To ensure the program's continued success, CTIA urges the Commission to implement the ACP consistent with these comments.

Respectfully submitted,

By: /s/ Jennifer L. Oberhausen
Jennifer L. Oberhausen
Assistant Vice President, Regulatory Affairs

Thomas C. Power
Senior Vice President and General Counsel

Scott K. Bergmann
Senior Vice President, Regulatory Affairs

CTIA
1400 16th Street NW, Suite 600
Washington, D.C. 20036
202.736.3200

December 8, 2021

⁷¹ 47 C.F.R. § 54.407.